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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC

In re Applications of	)	MM Docket No. 93-107
	)	
DAVID A. RINGER	)	File No. BPH-911230MA
	)	
ASF BROADCASTING CORP.	)	File No. BPH-911230MB
	)	
WILBURN INDUSTRIES, INC.	)	File No. BPH-911230MC
	)	
SHELLEE F. DAVIS	)	File No. BPH-911231MA
	)	
OHIO RADIO ASSOCIATES	)	File No. BPH-911231MC

For Construction Permit for an
FM Station on Channel 280A in
Westerville, OH

To: Administrative Law Judge
Walter C. Miller

REPLY OF SHELLEE F. DAVIS TO PROPOSED FINDINGS AND CONCLUSIONS

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SUMMARY

This is the reply of Shellee F. Davis to the proposed findings of fact and conclusions of law filed by the competing applicants in this proceeding. As seen herein, Davis is fully entitled to 100% quantitative integration credit. She has pledged to sell her existing business, the business in full marketable, and in any event, if the business cannot be sold, the business will not continue. The parties' claims that Davis will not honor her divestiture pledge or is incapable of operating the proposed business is wholly speculative, and should be rejected.

The other parties' claims to enhancement credit are exaggerated, and in any event, fail to exceed to credits due Shellee Davis for her superior, meritorious proposal. Thus, Davis' application should be granted.

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REPLY OF SHELLEE F. DAVIS TO PROPOSED FINDINGS AND CONCLUSIONS

Shellee F. Davis ("Davis"), by her attorney, hereby submits her response to the proposed findings of facts and conclusions of law submitted by the Mass Media Bureau ("MMB"), Ohio Radio Associates ("ORA"), ASF Broadcasting Corporation ("ASF"), Wilburn Industries, Inc. ("WII"), and David A. Ringer ("Ringer") in this proceeding.

1. As Davis established in her proposed findings and conclusions, the evidence adduced at hearing confirm that Davis should be awarded the permit in this proceeding. As Davis established, Davis is the clear-cut winner in this proceeding. She is entitled to 100% quantitative integration credit, and she is the only applicant

who brings to her application minority involvement and extensive past local ownership/civic participation, which are the two most significant enhancement factors considered by the Commission under the Standard Comparative Issue. Specifically, Davis (as do Ringer, ASF, and WII) all enjoy a decisive and substantial quantitative integration preference over ORA, insofar as ORA's principals have proposed no day-to-day integration into the operations of their proposed station. Moreover, while all other applicants (including Davis) are entitled to 100% quantitative integration credit, Davis alone is entitled to two substantial enhancements to her 100% quantitative integration credit (for minority involvement and past local residency/civic activities), a slight enhancement (for future residency), a slight preference over Ringer, ASF, and WII (for auxiliary power), and a slight preference over WII (for comparative coverage), in addition to her a substantial quantitative integration preference over ORA. ASF, in contrast, is entitled only to a single slight enhancement to its quantitative integration credit (for past broadcast experience), a slight preference over WII (for comparative coverage), a slight preference over Ringer (for past broadcast experience), and a substantial quantitative integration preference over ORA; Ringer is entitled to only one slight enhancement to his quantitative integration credit (for future residency) and one very slight enhancement (for past broadcasting experience), a slight preference over WII (for comparative coverage), and a substantial quantitative integration preference over ORA; and WII is entitled to absolutely no enhancements to its 100% quantitative integration credit or other preferences other than a substantial quantitative integration preference over ORA. ORA receives a slight preference over

ASF, Ringer, and WII (for auxiliary power); and one slight preference over WII (for comparative coverage). In short, due to her entitlement to a greater number of enhancements and preferences, Davis is the comparatively superior applicant in this proceeding. Accordingly, her application should be granted.

2. Davis' proposed findings and conclusions contain a complete and accurate summary of the facts and discussion of the law pertinent to this proceeding and should be adopted in their entirety. A review of some of the more substantial errors contained in the other parties' findings and conclusions are summarized below.

SHELLEE F. DAVIS

3. The competing applicants argue, as they must in order to stand a chance of prevailing in this proceeding, that Davis is not entitled to quantitative integration credit. In so doing, the applicants significantly misstate the facts in the record of this proceeding and the law applicable to those facts.

Quantitative Integration Credit

4. As a general matter, integration credit is warranted when the applicant sets forth a specific integration credit, the applicant adheres to that proposal, and there is a reasonable assurance that the plan will be carried out. Coast TV, 5 FCC Rcd 2751, 2752 ¶ 8 (1990); Royce International Broadcasting, 5 FCC Rcd 7063 ¶ 7 (1990). Where an applicant presents sworn evidence averring that he or she is the applicant's sole owner and in which he or she pledges to devote 40 hours per week at the station in the role of general manager, that pledge constitutes prima facie evidence that the applicant's integration plan will be carried out in the event the applicant receives a

grant. Helen Broadcasters, 7 FCC Rcd 6844, ¶ 3 (1993). In considering whether an applicant has met its burden of proof concerning integration, the entire record is appropriately considered, including testimony on cross-examination. Id. Accordingly, a promise to work at a station as a General Manager "should not be brushed aside unless compelling evidence to the contrary is available." Bisbee Broadcasters, Inc. 48 F.C.C.2d 291, 293 (Rev. Bd. 1974); Broadcast Associates of Colorado, 100 F.C.C.2d 616, 618 ¶ 5 (Rev. Bd. 1985). Integration credit only is to be denied where there is "compelling and specific record evidence establishing that the subject proposal is inherently unreliable." Frank Digesu, Sr., 7 FCC Rcd 837, ¶ 3 (Rev. Bd. 1992). "Mere suspicions" are no basis for disregarding an applicant's integration proposal. Goodlettsville Broadcasting Co., 8 FCC Rcd 57, 61 ¶ 17 (Rev. Bd. 1992); Cleveland Television Corp. v. FCC, 732 F.2d 962, 969 (D.C. Cir. 1984).

5. If an applicant proposes to retain an outside business interest, the very existence of [the] other interests renders questionable the applicant's integration commitments in the absence of an additional showing how those interests will be accommodated. Blancett Broadcasting Co., 17 F.C.C.2d 227 (Rev. Bd. 1969). A blanket pledge to hire more employees and diminish hours is not enough. Naguabo Broadcasting Co., 6 FCC Rcd 912, 924 n.63 (Rev. Bd. 1991), aff'd, 6 FCC Rcd 4879, 4880 (1990). Where, however, an applicant submits an unequivocal pledge to wholly terminate a practice or any other business interest, the Commission will award 100% quantitative full integration credit. Renee Marie Kramer, 5 FCC Rcd 563 (Rev. Bd. 1990), rev. denied, 5 FCC Rcd 5349 (1990), aff'd per judgement sub nom.

Joyner v. FCC, 946 F.2d 1565 (1991) (Table).[1] Here, Shellee Davis has proposed to work full-time as General Manager of her proposed station, and to effectuate that pledge, she has indeed committed that she will terminate all other paid employment and sell her existing business in order to effectuate her integration commitment. Davis Exh. 1 at 1. Even in the event she could not sell Britt for an acceptable price, she would cease operating Britt in the event she is awarded the permit in this proceeding. TR 420. Thus, Davis is entitled to 100% quantitative integration credit.

Sale of Britt Business Systems

6. ORA argues, in part, that Davis is not entitled to quantitative integration credit because she has "has made no effort to sell Britt." ORA Finding ¶ 12. That claim is both false, misleading, and irrelevant.

7. First, the claim is false. As the record shows, Ms. Davis already has transferred a portion of her company that previously was owned by her but was operated by her brother-in-law, Benjamin Davis. TR 431. Moreover, she has been collecting names of interested buyers, made inquiries concerning the proper steps to be made to transfer a business such as hers, begun reviewing publications where businesses such as hers are marketed, and has begun to arrange for a formal appraisal of her business to be conducted. TR 383-84. This is in addition to her ongoing efforts to promote the growth of the business, to ensure that it will be as marketable

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[1] Board Member Blumenthal has espoused the view that applicants be absolutely required to "forego altogether a significant business interest...or to demonstrate that he/she has been essentially a passive owner in the enterprise." Kevin Potter, 6 FCC Rcd 7278, 7282 (Rev. Bd. 1991) (Statement of Board Member Norman B. Blumenthal Concurring Dubitante).

as possible. TR 384, 391. In fact, she intentionally has developed Britt in such a way so that it can "stand on its own two feet" without her continued involvement. TR 386.

8. Moreover, ORA's claim is irrelevant. Davis has pledged to terminate all paid employment and will sell her existing business in order to effectuate her integration commitment. Davis Exh. 1 at 1. This pledge is clear and unequivocal. As Board Member Blumenthal recently noted:

> the Board has accepted an unequivocal pledge to wholly terminate a practice, see, e.g., Renee Marie Kramer, 5 FCC Rcd 563 (Rev. Bd. 1990), review denied, 5 FCC Rcd 5349 (1990), aff'd per judgement sub nom. Joyner v. FCC, 946 F.2d 1565 (1991) (Table), just as we regularly credit other pledges to wholly divest of any other business interest, absent some anticipatory showing to the contrary. Pledges to terminate completely a business interest are, relatively speaking, much easier to police. It is where an applicant proposes to retain, but reduce oversight of, a significant outside interest that precedent bridles.

Linda Kulisky, 8 FCC Rcd 6236, 6240 n.4 (Rev. Bd. 1993) (Statement of Board Member Blumenthal). The fact that she has not "already" sold (or, in ORA's view, not taken sufficient "efforts" to sell) her business is largely irrelevant. The pledge is one that is designed to be effectuated in the future, and as the Commission has stated:

> we do not expect applicants to forsake their livelihoods while their applications are pending.

Cuban American, Ltd., 2 FCC Rcd 3264, 3269 ¶ 22 (Rev. Bd. 1987); Anchor Broadcasting Limited Partnership, 6 FCC Rcd 721, 723 ¶ 13 (1987) (testimony concerning applicant's current residence not relevant to applicant's pledge of future residence in the community of license). See Coast TV, 4 FCC Rcd 1786, ¶ 3 (1989)

("it is unrealistic for this Commission to expect the status of the principals of an applicant to remain static during often length proceedings"). Integration credit has properly been awarded to applicants who nevertheless sign new contractual employment commitments during the pendency of Commission applications (Cuban American, Ltd., supra.), begin new careers (Poughkeepsie Broadcasting, Ltd., 5 FCC Rcd 3374, 3380 (Rev. Bd. 1990)), or even commence new educational endeavors (CR Broadcasting, Inc., 5 FCC Rcd 5348 (Rev. Bd. 1990)), as long as their activities or commitments can be fulfilled prior to the expiration of the permit's construction period or are terminable flexibly or at will.

9. Under the Commission's current processing schedule, it took 16 months for this case to be designated for hearing. It took an approximately an additional four and one-half months for completion of the hearing procedures, and two more months for the preparation and filing of proposed findings and conclusions and replies. Under the Commission's optimistic time deadlines, the parties will have to wait an additional 90 days for the issuance of an Initial Decision, five and one-half months for the issuance of a decision from the Review Board, and six months for Commission action on Applications for Review. Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 162-63 ¶ 39, 164 ¶¶ 49-50 (1990). In short, Davis (and all applicants in this proceeding), based upon the tenor of the filings in this proceeding, face a real prospect of not receiving a Final Order allowing the prevailing applicant in this proceeding to construct and operate this facility for over a year. Review before the

United States Court of Appeals will likely take another year, and even at that point, the prevailing party would not required to commence operations for 18 months under the terms of the construction permit that is to be issued in the proceeding. 47 C.F.R. § 73.3598(b). Thus, it may not be possible for Davis to commence operations for over two years, and the vagaries of business details, availability of equipment, non-FCC regulatory requirements, and promotional activities necessary to commence a new business may result in the reality that operations on Channel 281A will not commence for nearly three years. Davis, nor any other applicant, is forced under Commission precedent to immediately abandon sources of existing income prior to a final Order in order to be entitled to quantitative integration credit. Cuban American Ltd., 2 FCC Rcd 3264, 3269 ¶ 22 (Rev. Bd. 1987). Additionally, no applicant ever has a guarantee that its particular application will be granted. For this reason, just as the Commission does not require applicants' principals to go through the time and expense to move to a community prior to grant in order to receive credit for future residency (HS Communications, Inc., 7 FCC Rcd 6448, 6457 (Rev. Bd. 1992) (mere promise to relocate ordinarily sufficient; integration credit awarded although no plans to move have yet been made)), to purchase a transmitter site prior to grant in order to specify a transmitter site (Elijah Broadcasting Corp., 68 R.R.2d 205, 207 (1990) (it would not serve the public interest to add to the coats and risk that applicants incur by requiring them to secure binding commitments for the use of transmitter sites)), or to even go through the time and expense to submit a formal loan application prior to grant in order to validly claim that they are "financially qualified" (A.P. Walter, Jr.,

6 FCC Rcd 875, 879 n.5 (Rev. Bd. 1991); Las Vegas Valley Broadcasting Co., 589 F.2d 594, 599 (D.C. Cir. 1978) (since license application may not succeed "for years, or at all," Commission requires only that applicants establish a "reasonable assurance" of financing)), so, too, the Commission has never required applicants to go through the time and expense to begin active marketing of their existing businesses based upon a hoped-for, anticipated, but nevertheless speculative, grant from the Commission. ORA's argument should be rejected.

Marketability

10. The applicants also argue, essentially, that Davis' business is unmarketable, and she will be "unable" to sell her business in order to effectuate her integration commitment.

11. The major flaw in the parties' arguments lie in the fact that, as the Presiding Judge noted, whether a business is "marketable" lies predominantly in the question of what price the asset will be offered. TR 387. They fail to note that as Davis testified both in depositions and at the hearing, in the event she is awarded the permit in this proceeding, in the event Ms. Davis could not sell Britt for an acceptable price she would cease operating Britt. TR 420. Thus, in all events, there will be no impediment to Davis' ability to effectuate her full-time integration commitment.[2]

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[2] Stated otherwise, unlike the situation found apparently in Richard Bott II, 8 FCC Rcd 4074 (1993), where it developed that an applicant's integration pledge was contingent (there, on the practicality of introducing a certain specific format on his proposed station (id. at 4075-76 ¶¶ 9-10)), Davis proposal is entirely unequivocal.

12. Moreover, the claimed reasons for the alleged "unmarketability" of Davis' business are without basis. They claim, for example, that the business is unmarketable because of restrictions contained in its dealership contracts. WII Conclusions at 10[3]; Ringer Conclusion ¶ 67. The fact of the matter, however, is that the vast majority (80-85%) of Britt's business is through the sale of Xerox products. TR 430. What the parties fail to note is that while the Xerox dealership agreement requires prior written consent for assignment, the contract specifically provides that consent "shall not be unreasonably withheld." Ringer Exh. 6 at 5.

13. Therefore, the fact that some "prior consent" of Xerox is required prior to the contract's assignment (Ringer Conclusion ¶ 82; Ringer Conclusion ¶ 67; ASF Conclusion ¶ 65; WII Conclusions at 10-11) is irrelevant. An integration plan is sufficient as long as there is a "reasonable likelihood" that the applicant will be able to carry out its integration duties (Las Americas Broadcasting Co., 1 FCC Rcd 786, 794, ¶ 37 (Rev. Bd. 1986)), and that "likelihood" clearly exists here. Thus, for example, despite the fact that broadcast stations are not immediately assignable (i.e., insofar as

they require prior Commission consent prior to assignment), the Commission routinely credits applicants' bare assertion that they will divest themselves of conflicting broadcast licenses, despite the fact that the interests are not "freely

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[3] WII's proposed findings and conclusions do not contain serially numbered paragraphs as required by Section 1.264 of the Commission's Rules. 47 C.F.R. § 1.264. Accordingly, by necessity, references to WII's proposed findings and conclusion are to simply the page on which the referenced finding or conclusion appears.

assignable," without even a prior showing of "marketability." See Barry Skidelsky, 7 FCC Rcd 1, 8 ¶¶ 36-37 (Rev. Bd. 1992) (rejects contention that diversification demerit is warranted against competing applicant simply because it is "unclear whether [the applicant] can sell the stations"), rev. denied, 7 FCC Rcd 5577 (1992). Significantly, the competing applicants have submitted no testimony showing that Xerox is unlikely to abide by the terms of contract by withholding consent. Therefore, it should be determined that the provision of the Xerox contract do not even marginally affect the likelihood that Davis will be able to effectuate her integration commitment in this proceeding. As to the remainder of her business, only the 5% of her business governed by the Panasonic contract would not apparently be assignable. TR 430; Ringer Exh. 5 at 6-7. Cf. Ringer Conclusion ¶ 67 ("[h]er Panasonic contract...represents a large portion of her business"). In contrast, 10-15% is not restricted by any contractual limitations. TR 430.

14. Washoe Shoshone Broadcasting, Inc., 3 FCC Rcd 3948 (Rev. Bd. 1988) (cited by competitors at WII Conclusions at 11 and Ringer Conclusion ¶ 67), and Swan Broadcasting Limited, 6 FCC Rcd 17 (Rev. Bd. 1990) (cited at WII Conclusions at 11), are inapposite and are fully distinguishable. Washoe Shoshone involved a situation where an applicant's principal intended to retain his McDonald's franchised business, but a contractual provision obligated the principal to devote his full-time attention to that business. Integration credit rightfully was denied. Washoe Shoshone, 3 FCC Rcd at 3952 ¶ 15. Similarly, Swan Broadcasting also involved an applicant that intended to retain an existing business, but the applicant was

contractually obligated (under the terms of a program administered by the Small Business Association) to continue to work at the facility full-time as President and/or CEO of the business. There, too, integration credit was denied. Id. at 18 ¶ 6. What WII fails to note, however, is that the full Commission reversed and remanded that decision, and is allowing the applicant to explain how it can reconcile its SBA obligations with its FCC integration pledge. Swan Broadcasting, Ltd., 8 FCC Rcd 4208, 4209 ¶ 8 (1993).

15. Here, in any event, unlike Swan or Washoe Shoshone, Ms. Davis has pledged that she will not retain her existing business, and the fact of the matter is that no provision obligates her to continue to work for Britt. Unlike the situation found in those two cases, Ms. Davis could quit Britt immediately (and never spend another moment's time or attention to Britt) and not be in violation any contractual provision entered into with any other party.

16. In short, as the record demonstrates, there exists now, and has always existed, far more than simply a "reasonable" likelihood or assurance that her business is capable legally of being transferred to a new owner, as represented in this proceeding, and even if it is not, the business will cease. There exists no conflict, potential or possible, to Davis' integration proposal. The current existence of Davis' business poses no impediment to her ability to provide exclusive attention to the Westerville facility in the future, or to her entitlement to an award of 100%

quantitative integration credit in this proceeding.[4]

Value of Business

17. As to the parties' claims that it is unlikely that the Britt will be attractive or profitable as a business absent Ms. Davis' continued involvement (see, e.g., Ringer Conclusion ¶ 65), those claims are totally speculative. While it is true that Ms. Davis is the founder of Britt and established Britt as an on-going business entity (Davis Exh. 1 at 2), the parties have submitted no evidence (i.e., expert testimony) establishing in any way that Britt is "worthless" without her continued participation, that others with the same care and dedication to the business cannot also enable Britt not only to survive but to grow, or that existing clients will abandon Britt when it is sold. In fact, the record suggests otherwise. Ms. Davis' sales efforts currently involves taking orders on house accounts, which are accounts who have placed previous orders and who purchase additional equipment. TR 378. ORA claims that "Davis attributes the success of Britt to her personal involvement." ORA Finding ¶ 45. However, as she noted, the success of the company has not been based due solely on her sales and personal contacts. TR 377. As she noted, while originally her business was based predominantly on her personal contacts with her clients, over the course of time she has hired additional employees who also represent the company

[4] Ringer also suggests that since Davis' purported "key employees" will leave with her, this also will affect the marketability of the business. Ringer Conclusion ¶ 66. As the record shows, however, Ms. Kindall Carmichael is simply an office manager, and Mr. Jim Johnson is a sales representative. TR 382. He is not, however, even Britt's top salesperson. TR 383. His leaving will not necessarily affect the value of Britt since more salespersons already are being hired. TR 429.

well. TR 380. Britt currently has as clients such nationally-known clients as Anheuser-Busch, American Electric Power Company, the Columbus Public Schools, Ohio State University, the State of Ohio, the Columbia Bar Association, and the law firm of Baker & Hostetler. TR 418-19. No evidence has been presented that these clients would not remain with Britt even in the event Britt is sold.

18. As Ms. Davis testified:

> The value of Britt Business Systems would lie in such things as the inventory, accounts receivables, any other assets. Also, the customer base, the full service maintenance that...last over time, the good...name of the company, and also the potential ongoing business.

TR 428-29.

> Based on...the office equipment industry, what Britt has to offer, its standing in the community, [and] its standing as a Xerox dealer, Britt is a very marketable company.

TR 386. Neither the existence of these factors nor the validity of her opinion that her business is currently very marketable has in any way been challenged through the submission of evidence or conflicting testimony, competent or otherwise. Therefore, the parties' assertions to the contrary should be rejected as constituting mere speculation.

Credibility of Divestiture Pledge

19. Finally, the parties claim that it is "unbelievable" that Davis would abandon Britt in light of the success she achieved with Britt. ASF Conclusion ¶ 66; Ringer Conclusion ¶ 64; ORA Conclusion ¶ 82; WII Conclusions at 10. Again, the parties are engaging in unwarranted (and untrue) speculation.

20. The parties' objections are premised on the apparent belief that size of income is the be-all and end-all of career decisions, arguing that what they believe is Davis' current compensation belies her divestiture claims. That, in and of itself, is contrary to the record developed in this proceeding. As the record shows, through nearly every one of Ms. Davis' outside activities as well as the way she conducts her business, first and foremost Ms. Davis strives on an ongoing basis to serve the community. As she stated, the reason she applied for the frequency in this proceeding was because:

> it is very interwoven to the community. With... Britt, I have used Britt as a vehicle to do different thing within the community, to the best of Britt's ability financially and time...and also to the best of my ability. And, with the radio station being such a community focused enterprise, I thought that this would be a way that I could get even more creative and more involved in the community.
>
> Office equipment is okay. I mean, I have been able to be somewhat creative with selling office equipment based on...my marketing ability. I think my background in human relations in human relations, plus...dealing with customers, being involved in the community, being able to develop sales reps...would build a healthy company.
>
> * * *
>
> [W]hat I really am interested in more than anything...is being able to reach out more to the community and getting the community more involved, bringing more to them. And I really...feel, whether it's intuition or not, I really feel that I can do that.

TR 392-93. In short, Davis' primary intention is to serve the needs and interests of the community, whether it is through her continued relationship with Britt, or at her proposed radio facility. The monetary aspect is secondary.

21. ORA claims that "Davis' total compensation and profits from Britt were

about one hundred and five thousand dollars ($105,000)." ORA Finding ¶ 45. First of all, the compensation Davis in actuality currently enjoys is modest -- she receives a salary with bonuses of approximately $25,000, along with the payment of various expenses that she incurs. TR 422-23. It must be emphasized that Britt is a corporation, not a "d/b/a/." The compensation paid to Davis is for her personal use. The monies retained by Britt are retained for corporate uses. Corporate monies are not co-mingled with Ms. Davis' personal funds. The retained earnings will be passed on to Davis only when the business is liquidated or sold -- in the meantime they are retained and/or reinvested in the company to purchase additional assets (e.g. equipment) for the business and to offset losses accrued from past years. Cf. TR 382 (Ms. Davis has made loans to the company, some of which are still outstanding). Whether retained profits will exist in the future when the business is liquidated or sold is unknown. Until that time, however, Britt's profits do not yet constitute "compensation" to Davis from Britt, either direct or indirect.

22. As the Commission stated in Barry Skidelsky, 7 FCC Rcd 1, 9 ¶ 47 (1990), rev. denied, 7 FCC Rcd 5577 (1992), the Commission does not view with skepticism applicants' pledges to leaving existing businesses (even specialized businesses such as legal practices).[5] The Commission consistently has rejected the

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[5] As the Review Board stated in response to a similar argument in Renee Marie Kramer, 5 FCC Rcd 563 (Rev. Bd. 1990), rev. denied, 5 FCC Rcd 5349 (1990), aff'd per judgement sub nom. Joyner v. FCC, 946 F.2d 1565 (1991):

> [An applicant] also maintains that no "integration" credit should accrue its close competitor, because it doubts that Arthenia Joyner, a Tampa probate attorney, will yield sufficient hours

argument that its was "unbelievable" that an applicant would turn over his sole source of income in the event of a grant. Lynn Broadcasting, 7 FCC Rcd 8563, 8569 ¶¶ 27, 30 (Rev. Bd. 1992); Linda U. Kulinsky, 8 FCC Rcd 6235, 6238 ¶ 14 (Rev. Bd. 1993); Warmac Communications, Inc., 103 F.C.C.2d 1218, 1220 ¶ 3 (Rev. Bd. 1985), rev. dismissed, FCC 86-443 (1986) (Review Board rejects as speculative, absent submission of rebuttal evidence or effective cross-examination, claim that it is unlikely that competing applicant will leave her present position as nurse anesthetist that she has held for 30 years). See also, Perry Smith, 103 F.C.C.2d 1078, 1081 ¶ 4 (Rev. Bd. 1985) ("we will not infer lack of a viable integration proposal from the mere existence (and growth) of pre-license business activity"), rev. denied, FCC 86-109 (1986). As the Review Board specifically stated in Central Texas Broadcasting

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> from her law practice to devote full time to station management. It claims that Ms. Joyner's testimony contains contradictions of her plans for winding-down her practice, and that her failure to have advised current clients of her pending broadcasting proposal to the FCC suggests an inconsistency in her intentions. As [the applicant] itself states in its brief, Joyner has represented unequivocally that she will "retire from her law practice and she will hold no outside employment and...devote at least 40 hours per week to the management of the station." We find not only no legal gravity in [the applicant's] purported skepticism over Joyner's "integration" pledge, we find no logical basis in its bald suppositions. Just why is it unbelievable that an attorney would exchange a probate practice for ownership and management of a television station [the applicant] does not ever say, but we take note that any number of attorneys (including communications specialists) have migrated from the field of law to a pursuit in broadcasting. [The applicant's] contentions here are not only wholly conjuctual, but idiosyncratic to a fault (if not downright irrational).

Id. at 565 ¶ 12. The parties' contentions in this case are no less conjectural.

Co., 90 F.C.C.2d 583 (Rev. Bd. 1978), rev. denied, FCC 83-415 (1983), aff'd mem. sub nom. Blake-Potash Corp. v. FCC, No. 83-2112 (D.C. Cir. April 26, 1985):

> Where, as here, an applicant sets forth in some detail his integration proposal and specifically allocates his time so as to accommodate his outside interests in order to effectuate his proposal, absent persuasive proof, it is unwise to look behind those representations and speculate that the applicant will deceive the Commission by in fact devoting himself to another field because of its pecuniary importance to him. Such a judgement can only be reached by engaging in a subjective analysis of the inherent importance of one endeavor as opposed to another in the applicant's (and our own) scheme of values.

Id. at 596. The Commission is not a guarantor of financial success. Triangle Publications, Inc., 29 F.C.C. 315, 318 (1960), affirmed sub nom. Triangle Publications, Inc. v. FCC, 291 F.2d 342 (1961). So, too, is it not in the business of protecting applicants from what others believe are unwise business decisions. Two other applicants (Ringer and WII) are proposing to divest themselves of substantial businesses in the event their applications are granted, and all four competing applicants are investing considerable time, effort, and financial resources in the belief that operations on the frequency in controversy in this proceeding will produce a viable business that will serve the public interest. Davis' belief in the viability of the frequency should be no more viewed with skepticism than that of any other applicant, and the parties' protests to the contrary should be rejected.

23. Finally, all of the parties' fears that Davis will somehow "ignore" her specific divestiture pledge, aside from being speculative, is contrary to her specific testimony. ASF singularly claims that Davis testified that she would not necessarily sell Britt before operating the station (ASF Finding ¶ 36), citing TR 385. ASF's

reading of the transcript is wrong. The Presiding Judge asked Ms. Davis whether she would sell Britt before operating the station. TR 385. Davis agreed, stating "[she] would put it up for sale and hopefully someone will buy it as soon as possible." TR 385. As she clarified upon questioning from the Presiding Judge, she would not and could not operate both businesses simultaneously. TR 400. In fact, Davis further clarified the record later in her testimony by noting that in the event she could not sell Britt for an acceptable price, she would cease operating Britt. TR 420.[6] In the event Davis deviates from her integration pledge, she will be required to report that fact to the Commission, and the Commission is now taking appropriate enforcement action in cases where it appears that such deviations evidence that a misrepresentation to the Commission has occurred. Proposals to Reform the Commission's Comparative Hearing Process to Expedite to Resolution of Cases, 6 FCC Rcd 157, 160 ¶ 22 (1990); Richard P. Bott, 8 FCC Rcd 4074, 4076 ¶ 10 (1993).

24. The parties' also claim that Davis gave inaccurate information to a newspaper reporter, and she gave evasive testimony concerning the level of her compensation from Britt, and that these examples of alleged "lack of candor" affect her eligibility for a Commission license. ORA Conclusion ¶ 87; Ringer Conclusion ¶ 63.[7]

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[6] Incredibly, ORA's conclusions claim that the record reflects that "[i]f Davis could not obtain an acceptable price, she would not sell Britt." ORA Conclusion ¶ 82. No citation is made for this outrageous claim. This conclusion is at direct odds with the record. See TR 420 ("I would not operate Britt").

[7] In essence, the parties are requesting application of the maxim "Falsus in uno, falsus in omnibus (i.e., he who speaks falsely on one point will speak falsely on all). The

25. Specifically, ORA claims that "parts of her hearing exhibit are incorrect." However, as the record reflects, the only parts of her "exhibit" which are "inaccurate" are those portions which are attachments to her Written Testimony which not only are never relied upon or referenced in her hearing testimony, the references are not even in the record for the truth of the matters asserted therein. TR 83, 92. More basically, the parties arguments are nothing more that a rehash of ORA's Motion to Enlarge Issues Against Davis" filed by ORA on September 15, 1993, which was pointedly denied by the Presiding Judge on September 23, 1993. ORA claims that at TR 439-45 "Davis gave this information to the newspaper and knew at the time that it was not correct." ORA Finding ¶ 50. That claim is untrue. As established at the hearing, Benjamin Davis operated Britt Business Systems in Cleveland essentially as an independent contractor, retaining all profits (and bearing responsibility for all debts incurred) by that "arm" of the business. TR 432-33. That relationship was severed in March/April 1993. TR 431. Benjamin Davis and Shellee Davis were "partners" or a sort, but only the non-legal, broad layman sense (TR 441), in that they shared the common goal of promoting the "Britt Business Systems" name (although each for their individual proprietary gain). There is no testimony that reflects that Davis "knowingly" gave the news reporter false

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Commission has rejected this maxim. Dorothy Schulze, 7 FCC Rcd 3790, 3793 ¶ 13 (Rev. Bd. 1992). Generalized claims of "lack of candor" on collateral matters do not undermine integration credit unless they factually undercut the applicant's ability to effectuate a pledge to integrate full-time into the management of a station. Richardson Broadcasting Group, 5 FCC Rcd 5285, ¶ 4 (Rev. Bd. 1990), rev'd on other grounds, 7 FCC Rcd 1583 (1992), aff'd per curiam, Elizabeth M. Younts v. FCC, No. 92-1119 (D.C. Cir. May 10, 1993).

information.[8]

26. Ringer accuses Davis of engaging in a lack of candor with respect to her testimony concerning the amount of income she receives from Britt Business System on an annual basis. Ringer Conclusion ¶ 62. Davis also did not engage in a misrepresentation or lack of candor with respect to this matter. As her testimony shows, when Davis was questioned about her "total salary and dividends," she accurately testified that her annual salary and bonuses from Britt Business System in 1992 totalled approximately $25,000. TR 421. That response was direct and immediate. The interrogation, however, admittedly became more complex when questioning turned to an inquiry concerning broader matters such as her "total compensation" "[she] receives" from Britt Business Systems (which is approximately $26,300 (TR 421-22)), which then eventually turned to and evolved into questions concerning precisely what amount of profit Britt Business Systems enjoys from its

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[8] As Ms. Davis explained, the information (if indeed it was provided to the reporter precisely as printed in the article) was not provided to the reporter with an intent to mislead the reporter. As Ms. Davis explained:

> I might have [told the newspaper that Benjamin Davis was vice president of Britt] because Ben and I were going over whether he should become vice president or that he shouldn't, whether we should go into partnership. I told him that if he becomes vice president then he's going to have to give up some money for it, and we did not come to a conclusion on him playing any financial part within Britt to become a partner other than the fact that he runs Cleveland office and that's a separate profit center up there and he pays his own expenses. And he did not become vice president because we did not go into that arrangement where he had financial input into the Columbus business.

TR 441.

customers each year. TR 425-26. Although Ms. Davis repeatedly expressed her confusion at some points during the questioning,[9] being confused by questions is neither an actionable offense against the Commission not should it be viewed as reflective of any "inability" Davis has to be "completely forthright with the Commission." Cf. Ringer Conclusion ¶ 62. In each case Davis clearly answered the precise question that was being asked, to the best of her ability. There was no "lack of candor."[10]

27. As to both matters, the Presiding Judge agreed, and concluded:

> The Trial Judge has gone over Davis Exhibit 1 (Integration and Diversification), Davis Ex. 2 (Auxiliary Power), and all of Ms. Davis' testimony (Tr. 374-445). He can find absolutely no creditable basis for saying she knowingly and unintentionally misrepresented in her hearing exhibit. Nor is there any creditable basis for saying she gave evasive and candorless testimony....
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> The most that one can glean from Ms. Davis' hearing testimony is that she may have misled a newspaper reporter who was interviewing her back in 1991. This is of no great moment and

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[9] TR 422 ("I may be misunderstanding this a bit..."); TR 426 ("I, I thought you meant me as the, as being paid 25,000...").

[10] Davis never "finally [admitted] that her income was actually larger." Cf. Ringer Conclusion ¶ 62. It again must be emphasized that Britt is a corporation, not a "d/b/a/." The compensation paid to Davis is for her personal use. The monies retained by Britt are retained for corporate uses. Corporate monies are not co-mingled. The retained earnings will be passed on the Davis only when the business is liquidated or sold -- in the meantime they are retained and/or reinvested in the company to purchase additional assets (e.g. equipment) for the business and to offset losses accrued from past years. Cf. TR 382 (Ms. Davis has made loans to the company, some of which are still outstanding). Whether retained profits will exist in the future when the business is liquidated or sold is unknown. Until that time, however, Britt's profits do not yet constitute "compensation" to Davis from Britt, either direct or indirect. The questions were answered accurately by Davis, and there was no "lack of candor."